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IN THE

Supreme Court of the United States

October Term, 1974
No. 75-111

BUILDERS ASSOCIATION OF SANTA CLARA—SANTA CRUZ COUNTIES, a California corporation, individually and for the benefit of its members, *Appellant,*

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA CLARA, *Appellee,*

CITY OF SAN JOSE, a Chartered City, CITY COUNCIL OF SAN JOSE, NORMAN Y. MINETA, JOSEPH A. COLLA, JANET GREY HAYES, ROY B. NAYLOR, ALFREDO GARZA, JR., SUSAN WILSON and JAMES SELF, as members of the CITY COUNCIL OF SAN JOSE,
Real Parties in Interest.

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

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IN THE

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BUILDERS ASSOCIATION OF SANTA CLARA—SANTA CRUZ COUNTIES, a California corporation, individually and for the benefit of its members,

Appellant,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA CLARA,

Appellee,

CITY OF SAN JOSE, a Chartered City, CITY COUNCIL OF SAN JOSE, NORMAN Y. MINETA, JOSEPH A. COLLA, JANET GREY HAYES, ROY B. NAYLOR, ALFREDO GARZA, JR., SUSAN WILSON and JAMES SELF, as members of the CITY COUNCIL OF SAN JOSE,

Real Parties in Interest.

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

Appellant, Builders Association of Santa Clara-Santa Cruz Counties, a California corporation (now known as the Associated Building Industry of Northern California, Southern Division), individually and for and on behalf of its members, appeals from the decision and judgment of the Supreme Court of the State of California (three justices dissenting) declining to issue a peremptory writ of mandate directing the Superior Court of the State of California for the County of Santa Clara to enjoin enforcement of an anti-growth zoning ordinance enacted as an initiative by the voters of the City of San Jose, California.

Opinions Below.

Copies of the memoranda of decision of the Superior Court of the State of California for the County of Santa Clara rendered on October 11 and November 20, 1973 are attached as Appendices A and B respectively. Copies of the majority opinion of the Supreme Court of California from which this appeal is taken and of the dissenting opinion are attached as Appendix C. That decision is reported at 13 Cal.3d 225, 118 Cal.Rptr. 158, 529 P.2d 582. Attached as Appendix D are copies of the majority and dissenting opinions of the Supreme Court of California in the companion case of *San Diego Building Contractors Association v. City Council of the City of San Diego* which is referred to by the Supreme Court of California in its opinion in this case, and which is now pending appeal in this Court, Docket No. 74-1459. That decision is reported at 13 Cal.3d 205, 118 Cal. Rptr. 146, 529 P.2d 570. Attached as Appendix E is a copy of the order of the Supreme Court of California entered on February 19, 1975 denying appellant's petition for rehearing.

Grounds of Jurisdiction.

Appellant is a non-profit corporation organized under the laws of the State of California as a trade association of developers, subdividers, lenders, architects, engineers, suppliers, title companies and others involved in residential construction in the Counties of Santa Clara and Santa Cruz. Appellant consists of approximately 70 builder members and approximately

200 associate members, all of whom have a common interest in the residential housing industry of the Santa Clara Valley, in which the City of San Jose is located.

Appellant commenced an action in the Superior Court of the State of California for Santa Clara County seeking an injunction prohibiting the City of San Jose, City Council of San Jose and the individual members of the City Council of San Jose from enforcing San Jose Ordinance No. 16764, known as "Measure B". The Superior Court denied relief. Appellant, rather than appealing, then commenced an original proceeding in the Supreme Court of California on behalf of itself and all of its individual members by filing a petition for a writ of mandate directing the Superior Court to issue a preliminary injunction. The Supreme Court of California issued an alternative writ of mandate but, in the decision which is the subject of this appeal, discharged that alternative writ and denied the petition for writ of mandate.

Appellant contended below that Measure B violated the Fourteenth Amendment to the Constitution of the United States because it denies equal protection of the laws and is also unconstitutional because it interferes with the federal constitutional right to travel. Appellant also contended that adoption of a zoning ordinance by initiative is prohibited by the Due Process Clause of the Fourteenth Amendment.[1] The Supreme Court of California, in a four to three de-

[1]Appellant also challenged the ordinance on state grounds which are not relevant here.

cision, rejected these constitutional challenges, in effect affirming the decisions of the Superior Court.

The Supreme Court of California rendered its opinion on December 26, 1974. Appellant filed a timely petition for rehearing on January 10, 1975, which was denied on February 19, 1975 (Appendix E). A timely notice of appeal to this Court was filed in the Supreme Court of California on April 9, 1975, a copy of which is attached hereto as Appendix F. See 28 U.S.C. §2101(c).

This Court has jurisdiction of this appeal under 28 U.S.C. §1257(2) because this appeal draws in question the validity of a statute of the State of California on the ground it is repugnant to the Constitution of the United States, and the decision below is in favor of the validity of that statute. A state court decision upholding the constitutionality of a municipal ordinance is a decision sustaining the validity of a state "statute" within 28 U.S.C. §1257(2). *King Manufacturing Co. v. City Council of Augusta,* 277 U.S. 100 (1928); *Breard v. Alexandria,* 341 U.S. 622, 625 (1951); *Lathrop v. Donohue,* 367 U.S. 820, 824-25 (1961).

Statutes Involved.

This case presents the question of the validity of Ordinance No. 16764 of the City of San Jose, California (commonly known as "Measure B"), which became effective on April 27, 1973. Measure B by its terms expired on April 26, 1975, except Section 4, which is permanent. Subsequent to the rendition of the opinion of the Supreme Court of California, the City of San Jose enacted an ordinance which extended the life of Measure B to December 31, 1975. Measure B provides as follows:

Ordinance No. 16764.

INITIATIVE ORDINANCE OF THE CITY OF SAN JOSE PLACING A TWO-YEAR RESTRICTION ON ZONING FOR RESIDENTIAL PURPOSES IN NEIGHBORHOODS WHERE THE TOTAL AREA OF SCHOOL BUILDING CONSTRUCTION PER PUPIL OF ESTIMATED ENROLLMENT IS BELOW CERTAIN STANDARDS; CALLING FOR THE UNDERTAKING OF STUDIES, DURING SAID TWO-YEAR PERIOD, OF ISSUES, RELATING TO FURTHER RESIDENTIAL DEVELOPMENT; AND REQUIRING AN AFFIRMATIVE VOTE OF FIVE MEMBERS OF THE CITY COUNCIL TO OVERRULE PROTESTS OF SCHOOL DISTRICTS TO CERTAIN ZONING AND PERMITS.

BE IT ORDAINED BY THE PEOPLE OF THE CITY OF SAN JOSE WHEREAS:

1. The protection of the health, safety, and general welfare of the citizens of the City of San Jose requires that further residential development not be allowed to occur in any neighborhood of the city where essential community services do not meet certain minimum standards.

2. Adequate schools, in which children are not required to be in overcrowded classrooms or on double sessions, are among the most vital of the community services that must be provided in conjunction with all new residential development.

3. The school districts in San Jose have done their utmost to keep up with expanding residential developments in San Jose, but have been unable to do so.

4. Under the circumstances, the failure of the San Jose City Council to require the provision of adequate schools as a condition to new residential development has created a major crisis, in which a substantial number of children do not have adequate facilities for education.

5. For the foregoing reasons, it is necessary and appropriate that residential development be restricted for a temporary period of two years, during which time studies can be made of the school problem and other issues relating to further residential development.

Now, therefore,

1. For a period of two years from the date this ordinance becomes effective, the City Council of San Jose shall not zone, pre-zone, or re-zone any land for residential use, if such land is located in a school district where the total area of school building construction per pupil of estimated enrollment, counting the estimated enrollment of the proposed development itself, will be less than that computed under the following schedule:

Type of School	Enrollment	Sq. Ft. Per Pupil
Elementary school comprising kindergarten and grades 1 to 6 inclusive	300 or more	55
Elementary school comprising grades 7 and 8	750 or more	75
Junior high school comprising grades 7 to 9 inclusive	750 or more	75
Junior high school comprising grades 7 to 10 inclusive	750 or more	75
High school comprising grades 7 to 12 inclusive	750 or more	80
High school comprising grades 9 to 12 inclusive	750 or more	85
High school comprising grades 10 to 12 inclusive	750 or more	85

For purposes of this ordinance, the estimate of enrollment must be one which is valid for use under Section 19420 of the California Education Code, as amended.

This section shall apply to ordinances which are adopted as urgency or emergency ordinances.

2. During the aforesaid two-year period, the City of San Jose, in cooperation with all entities in any way responsible for community services within the City, and with maximum citizen participation, shall undertake a thorough study of all problems connected with further residential development in the City, including, but not limited to, the following:

a) How all further residential developments can be allowed to take place only with insurance that all necessary community facilities will be provided concurrently with such development.

b) Whether further residential development should be allowed if it violates any environmental standards, particularly those pertaining to water and air pollution, or overtaxes the ground water supply.

c) What are the costs and benefits of further residential development, and how can the City ensure that any development that does take place shall constitute a net benefit to the City.

d) How further residential development can be required to include an equitable proportion of housing for all income levels.

e) What the optimum population level is for the City of San Jose, considering all environmental, economic, and other human factors.

f) What actions can be taken to ease the shift of the San Jose economy to one less dependent on residential growth.

3. The provisions of Section 1 of this ordinance shall not apply if there is filed with the City Council,

by or on behalf of the governing bodies of all school districts in which the subject land is situated, written certification that the party seeking residential use has entered into binding agreements to provide a satisfactory temporary alternative to permanent school construction.

4. If, prior to the closing of the City Council hearing on a proposed ordinance zoning or rezoning property to a residential use, or granting any permit of any kind for residential use, there is filed with the City Council, by or on behalf of the governing body of any school district in which the subject property is located, a written protest against the adoption of the proposed ordinance or permit, on the ground that said governing body has found that said ordinance or permit would tend to cause impaction in any individual school or schools in said district, then in that event the City Council shall not adopt said ordinance unless said Council first overrules such protest by an affirmative vote of five or more of its voters.

This section shall apply to ordinances which are adopted as urgency or emergency ordinances.

5. No part of this ordinance may be amended or repealed except by the voters of the City of San Jose at a regular municipal election.

6. If any portion of this ordinance is declared invalid, the remaining portions are to be considered severable and valid.

Adopted by the People of the City of San Jose at the General Municipal Election held on April 10, 1973, the results of which were declared by the Council of the City of San Jose on April 17, 1973, and effective on April 27, 1973.

Questions Presented.

1. Do the Constitution of the United States and the federal constitutional right of citizens to travel permit a municipality to restrict its growth, to impede the inflow of new residents and to impair the mobility of its present residents by enacting an ordinance which prohibits for a period of two years (now extended for an additional eight months) the zoning of property for residential use, and which permanently requires a super-majority of the city council to zone for residential use property located within a school district with overcrowded schools?

2. Does the Equal Protection Clause of the Fourteenth Amendment allow a municipality, under the guise of a zoning ordinance, to authorize school districts to exact from builders and purchasers of housing on land *newly* zoned for residential use the cost of eliminating overcrowded schools when builders and purchasers of housing on land *already zoned* for residential use are not required to pay such costs? See *Vlandis v. Kline,* 412 U.S. 441, 450 n.6 (1973).

3. Does zoning by popular initiative without notice or hearing for the affected property owners violate the Due Process Clause of the Fourteenth Amendment?

Standing.

It is the settled law of California that the Supreme Court by issuing the alternative writ of mandate "necessarily determined that there is no adequate remedy in the ordinary course of law and that [the] case is a proper one for the exercise of [its] original jurisdiction." *Westbrook v. Mihaly,* 2 Cal.3d 765, 773, 87 Cal.Rptr. 839, 844, 471 P.2d 489, 492 (1970); *San Francisco Unified School Dist. v. Johnson,* 3 Cal.3d

937, 945, 92 Cal.Rptr. 309, 313, 479 P.2d 669, 673 (1971); *Mills v. Municipal Court,* 10 Cal.3d 288, 297, 110 Cal.Rptr. 329, 335, 515 P.2d 273, 279 (1973). The California Supreme Court exercises this original jurisdiction "only in cases in which 'the issues presented are of great public importance and must be resolved promptly' . . . ." *San Francisco Unified School Dist. v. Johnson, supra,* 3 Cal.3d at 944, 92 Cal.Rptr. at 312, 479 P.2d at 672.

Since this case arose in the state courts and appellants did not seek damages, but sought only injunctive relief, *Warth v. Seldin,* .... U.S. ...., 43 U.S.L.W. 4906, 4913-14 (1975), is inapplicable. *Warth* came to this Court through the federal courts and deals with principles of standing appropriate for cases originating in those courts. See 43 U.S.L.W. at 4908-09.

This case unquestionably presents an actual "case and controversy", and therefore the Constitutional prerequisite under Article III to this Court's jurisdiction is met. Application of the rules of standing which obtain in the lower federal courts to cases coming to this Court from state courts is inappropriate. Those rules are not relevant to the initiation of litigation in the state courts and applying them would significantly frustrate the Congressional intent that this Court have jurisdiction to review substantial federal questions which arise in the state courts.

If this Court has any doubt concerning appellant's standing, appellant respectfully suggests that the standing issue itself raises a substantial federal question warranting plenary review by this Court.

Statement of the Case.

This case presents the issue of whether the Constitution and principles of federalism allow those who arrived earlier to discriminate against those trying to arrive later. The existing overcrowding of the San Jose schools to which Measure B is addressed has not been caused by those who have not yet arrived but by those already there. Measure B is an attempt to force the newcomers to bear a disproportionate share of the cost of rectifying pre-existing community problems.

The City of San Jose is at the southern apex of the San Francisco-Oakland Bay area. With a population in excess of 500,000 persons, San Jose is California's fourth largest city and is the largest city to have enacted a growth control zoning ordinance. See Deutsch, "Land Use Growth Controls: A Case Study of San Jose and Livermore, California", 15 Santa Clara Lawyer 1, 3 (1974). The parties agree that San Jose has been, and over the next twenty-five years will continue to be, a major population growth center in northern California. [Rptr. Tr. October 18, 1973 at 43-44.]

During 1972 and early 1973, a coalition of environmental and citizens' organizations circulated a petition supporting an initiative ordinance to restrict residential zoning in areas of San Jose where school districts were "overcrowded". The ordinance was approved by the voters on April 10, 1973,[2] to be effective through April 26, 1975, and is commonly known as "Measure B". See, *supra,* pp. 5-8. The ordinance gives such school districts the right to protest new residential zoning before the City Council; only a super

[2]Twenty-one percent of the registered voters actually voted, which is a normal turnout for a San Jose municipal election, and fifty-three percent of those voting supported the ordinance. Deutsch, "Land Use Growth Controls: A Case Study of San Jose and Livermore, California", 15 Santa Clara Lawyer 1, 15 (1974).

majority of five of the council's seven members can override such a protest and zone or re-zone land for residential uses. The ordinance also provides for certain studies related to further residential development, and imposes a two year zoning freeze while the studies are undertaken. The provision permitting school districts to protest new residential zoning and requiring a super majority of the City Council to override such a protest is permanent. The San Jose City Council has extended the zoning freeze and study provisions of the ordinance through December 15, 1975, by adding Section 9112.14 to the San Jose Municipal Code (Ordinance No. 17659).

Appellant filed a complaint for declaratory and injunctive relief in the Superior Court of the State of California for the County of Santa Clara (in which San Jose is located) on July 16, 1973. Appellant alleged that the ordinance violated the equal protection clause of the Fourteenth Amendment and the federal constitutional right to travel as well as various principles of state law. Appellant also alleged that adoption of a zoning ordinance by initiative violated the Due Process Clause of the Fourteenth Amendment. These federal constitutional questions were raised in the complaint and briefs appellant filed in the Superior Court, which ruled against appellant. See Appendices A and B.

Appellant filed a petition for writ of mandate in the Supreme Court of California on January 25, 1974. The federal constitutional issues were raised in that petition and the supporting briefs. That court issued an alternative writ of mandate to bring the case before it, specifically considered the federal constitutional issues and, by a 4 to 3 majority, ruled against appellant on each of them. Appendix C at 6, 11-13.

THIS CASE PRESENTS SUBSTANTIAL AND FUNDAMENTAL ISSUES UNDER THE CONSTITUTION OF THE UNITED STATES AND PRINCIPLES OF FEDERALISM.

I.

The Issues Are Substantial Because San Jose Is Not Alone in Attempting to Impede the Movement of New and Present Residents by Growth Control Ordinances and Such Attempts Have a Significant Impact.

Numerous other communities in northern California have enacted growth control ordinances. The Association of Bay Area Governments ("ABAG") reported in 1974 that five communities had passed growth control ordinances, five had taken down-zoning actions, two had such ordinances in proposal or study stages, and five others had undertaken studies which would lead to such action. ABAG, *Economic Issues in Growth Policy Formulation for the San Francisco Bay Area Region,* Issue Paper No. 5, p. 3 (October, 1974). (Alameda, Livermore, Milpitas, Petaluma and San Jose had passed ordinances; Pleasanton and Union City had ordinances under study; the cities of Napa, St. Helena, and Santa Rosa and the counties of Napa and Santa Clara were either conducting or had completed studies.) Many of these ordinances were substantially identical to Measure B. See Clark and Grable, "Implementation of Timing and Sequential Control of Residential Development", 5 Pac.L.J. 570, 595-96 (1974).

These ordinances have met with varying fates in the courts. While the state courts upheld the San Jose ordinance, the Livermore and Petaluma Ordinances have been declared invalid by the California Court of Appeal and the District Court for the Northern District

of California respectively. *Associated Home Builders v. City of Livermore,* 41 cal.App.3d 677, 116 Cal. Rptr. 326 (1974), *appeal pending,* California Supreme Court; *Construction Industry Association v. City of Petaluma,* 375 F.Supp. 574 (N.D.Cal. 1974), *appeal pending,* U.S.C.A. Ninth Cir.

The State of California has taken virtually no effective action toward the development of a regional planning process which would take into account the myriad factors necessary to provide adequate housing, adequate schools, and adequate open spaces—while at the same time not interfering with constitutionally protected rights. See Marks and Taber, "Prospects for Regional Planning in California," 4 Pac.L.J. 116, 142 (1973). Regional planning systems encompassing entire states have been enacted and are practical and feasible. Hawaii has a state-wide land use law. Hawaii Revised Statutes Sections 205-1 to 205-15 (1968), as amended, Sections 205-1 *et seq.* (Supp. 1971). Maine has comprehensive statewide land use control policies. See Note, "Local Versus State and Regional Zoning: The Tragedy of the Commons Revisited", 47 Conn.B.J. 249, 255-56 (1973). Vermont uses a system of rigorous controls requiring state review of significant development decisions. See generally Levy, "Vermont's New Approach to Land Development", 59 A.B.A.J. 1158 (1973).

Measure B represents one element of a strategy by San Jose to secure lower tax rates for its present residents at the expense both of its future residents and of citizens of other parts of the Bay Area. This strategy is now familiar and has been referred to in planning literature as "fiscal zoning". See J. Margolis, "On Municipal Land Policy for Fiscal Gain", 9 Nat. Tax J. 247-

57 (1956); D. Netzer, *Economics and Urban Problems* 192 (New York, Basic Books 1970). Fiscal zoning has created an important inter-governmental problem. See Advisory Commission on Inter-governmental Relations, *Metropolitan Economic and Social Disparities* 95 (Washington, G.P.O., Jan. 1965). Fiscal zoning has been condemned because it is an example of a local government representing those who "got there first" against those arriving later. See T. Crowell, *The Use of Land: A Citizens Policy Guide to Urban Growth* 234-35 (New York 1973). This Court has recognized that this kind of financial discrimination against late arrivals by state governments is contrary to the principles of the Equal Protection Clause. See *Vlandis v. Kline,* 412 U.S. 441, 450 n.6 (1973).

When other localities within the same region also engage in the same kind of growth control and fiscal zoning, as has occurred in northern California, the result is the eruption of a "mercantilistic" warfare and a Balkanization in which the use of the police power does not advance the general welfare of the region but actually harms it. People who are excluded from one locality are forced into other localities. People are denied the option of living at a convenient distance from their places of work and must bear the additional costs of travel while at the same time contributing to the growing urban problems of transportation and pollution. San Jose's attempt to evade bearing its share of the cost of educating the children of the region forces that cost to be borne by some other community. One community's solution becomes another community's problem. This is so because the issue is not really one of growth control; the issue is one of "where shall they live" or of geographic rearrangement.

The accelerating race of numerous municipalities to make themselves walled enclaves requires the intervention of this Court to restate the guiding principles of federalism and constitutional law which require that all communities assume their fair share of the burdens of solving national problems. "[L]egislative action in the agitated field of private land use will probably be forthcoming only when the bench challenges the current posture of the law." Bosselman, "Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?", 1 Fla.St.U.L.Rev. 234, 256 (1973); Note, "Regional Impact of Zoning: A Suggested Approach", 114 U.Pa.L.Rev. 1251, 1259 (1966); Recent Cases, 83 Harv.L.Rev. 679, 683 (1970); Note, "Local Versus State and Regional Zoning: The Tragedy of the Commons Revisited", 47 Conn.B.J. 249, 253 (1973).

II.

The San Jose Ordinance Infringes the Federally Protected Right of Citizens to Travel.

One contending that a state enactment infringes the federally protected right to travel need not show that he himself has been deterred from traveling. See *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 257 (1974); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Construction Industry Association v. City of Petaluma*, 375 F.Supp. 574, 581-82 (N.D.Cal. 1974), *appeal pending*, U.S.C.A. Ninth Cir.; see Note, "The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?", 39 U.Chi.L.Rev. 612, 634 n.121 (1972); Notes and Comments, "The Reconciliation of Land Use Laws and the Right to Travel: Toward a Realistic Standard of Judicial Review", 31 Wash. & Lee L.Rev. 575, 597 n.120 (1974).

Americans have long enjoyed and valued the freedom to live anywhere within the country. "[N]early twenty percent of the nation's population changes its place of residence each year. Freedom 'to migrate, resettle, find a new job, and start a new life' may be viewed as part of the liberty that distinguishes American life from the more stratified and less mobile societies of the 'old world'." Note, 39 U.Chi.L.Rev., *supra*, at 632, quoting *Shapiro v. Thompson*, *supra*, 394 U.S. at 629. This Court has held that the right to travel is a "basic constitutional freedom", *Memorial Hospital v. Maricopa County*, *supra*, 415 U.S. at 254, a "fundamental personal right," *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972), and an "*unconditional* personal right," *Id.* at 341 (emphasis in original). In this sense there is no distinction between the right to travel among several states or within one state. *Memorial Hospital v. Maricopa County*, *supra*, 415 U.S. at 255-56; *Cole v. Housing Authority of the City of Newport*, 435 F.2d 807 (1st Cir. 1970); *King v. New Rochelle Municipal Housing Authority*, 442 F.2d 646, 648 (2d Cir.), *cert. den.*, 404 U.S. 863 (1971); see *Stoner v. Miller*, 377 F.Supp. 177, 180 (E.D.N.Y. 1974); *Construction Industry Association v. City of Petaluma*, *supra*, 375 F.Supp. 574.

The California Supreme Court held that the San Jose ordinance created no ". . . noticeable or significant infringement upon the asserted constitutional right to travel." Appendix C at 13. That conclusion is clearly erroneous.

San Jose doubled in size from 1960 to 1970, two-thirds of that growth resulting from net in-migration. One-quarter of San Jose's population over five years of age in 1970 had moved into the area since 1965,

nearly 15 percent from another state. U.S. Bureau of the Census, *1970 Census of Population,* Vol. 6, Table 50.

The San Jose ordinance prohibits the zoning of new land for residential use without the builder's assurance of substantial payments for school facilities. The vast bulk of San Jose's remaining developable land is in school districts which will be in a position to exact these school fees. Livingston & Blayney and Le Blanc & Co., *Evaluation of the Effects of Measure B,* Working Paper No. 1 at 14 and 16 (April 10, 1975) (hereinafter "Measure B Study").[3] Thus, potential newcomers to San Jose, as well as present residents desiring to move to newly developed areas, will either have to defer moving or pay a school facility entry fee in order to exercise that right. While such fees would first be imposed upon property owners seeking to build, San Jose's own consultants acknowledge that such fees would immediately be passed on to ultimate consumers of housing. *Measure B Study, supra,* at 17 and 19; see Feldman, "The Constitutionality of Subdivision Exactions for Educational Purposes," 76 Dick.L.Rev. 651, 658-59 (1972).

To the extent the market allows, developers who pay school exactions under Measure B will pass those costs on to the consumer—increasing rents and the costs of home buying. And, as the *Measure B Study* points out, the increase in purchase price to reimburse the builder has substantial, long-lasting economic effects. The higher price will result in a higher assessed value of the unit, and thereby higher property taxes every

[3]This is the first working paper of the official study required by section 2 of Measure B.

year. The amount of the mortgage will increase, leading to larger annual interest payments and other carrying charges. *Measure B Study, supra,* at 19.

Whether forced to defer a move and lose the opportunity to obtain housing then available, or forced to pay a fee to move, those who would inhabit new dwellings in San Jose are permanently affected. That San Jose's ordinance is designed to restrict further population growth is evident in its preamble and in the directives for the study to be conducted. See, *e.g.,* Section 2(e), p. 7, *supra.* This Court may be sure there are persons who would be deterred from migrating by Measure B. See *Cole v. Housing Authority of the City of Newport, supra,* 435 F.2d at 811 n.12 (1st Cir. 1970).

III.

The San Jose Ordinance Is in Violation of the Equal Protection Clause of the Fourteenth Amendment.

The principal impact of Measure B has been that school districts located in San Jose which are "overcrowded" have forced developers seeking residential zoning to agree to make payments to alleviate that overcrowding. See *Measure B Study, passim;* Deutsch, "Land Use Growth Control: A Case Study of San Jose in Livermore, California," 15 Santa Clara Lawyer 1, 20 n.110 (1974). Evidence was presented in the trial court that at least one school district was attempting to force a member of appellant to agree to pay a substantial amount of money to that district "up front" without regard to the time of commencement of construction, the time of completion of construction or whether any construction at all ever commenced. [Testimony of Jesse Stacy of Arcadia Development Company, Rptr. Tr. October 18, 1973 at 16-39.]

Since the developer will attempt to pass these school exactions on to the ultimate purchaser (see *Measure B Study, supra,* at 19 and testimony of Stacy, *supra*), the effect of Measure B is to impose on one class of persons—purchasers of housing built on land which is recently zoned for residential purposes—a special and additional exaction to defray the cost of the San Jose public schools. *Measure B Study, supra,* at 17-21. Persons presently living in existing residential units or persons who purchase housing built on land which has previously been zoned for residential use are not subject to this exaction. The exaction is thus in the nature of an "entrance fee" for the privilege of living in the more recently developed parts of San Jose.

"Whatever the charge, the newcomer pays more than the earlier arrival for the same current quality of education. . . . Because it increases housing costs, Measure B affects housing opportunities available to families of moderate income. . . . Present residents in the service areas of over-crowded schools are the primary beneficiaries of Measure B because they receive some relief at no direct cost." *Measure B Study, supra,* at 19-21.

The court below held that San Jose can constitutionally require purchasers of housing constructed on newly zoned property to pay these entrance fees because all the ordinance does is exact fees sufficient to cover the need for increased facilities attributable to their planned activities, and concluded this does not violate the equal protection clause. Appendix C at 11-12. This rationalization is not convincing. The exactions are not based on the creation of new housing facilities but on the creation of housing facilities located on particular parcels of land which just happen to have been the latest zoned for residential use. A

developer building a hundred homes on a parcel which has been vacant for 20 years, but which is zoned for residential purposes, or a family remodeling an existing house to accommodate additional children, is not required to make any contribution whatever to defray the additional costs attributable to its planned activities or to the burden it may put on the neighborhood school.

The court below based its rejection of appellant's equal protection argument on *Jordan v. Village of Menomonee Falls,* 28 Wis.2d 608, 137 N.W.2d 442 (1965), *appeal dismissed,* 385 U.S. 4 (1966). *Jordan* and all other cases appellant has found which concern the propricty of school exactions have considered challenges not under the equal protection clause but on the grounds that they were not reasonable regulations under the "police power" and constituted takings of private property without just compensation. For that reason, *Jordan* does not support the court below in its rejection of appellant's equal protection arguments.

This Court has recognized that state laws which operate to apportion costs on the basis of old and new residents "would give rise to grave problems under the Equal Protection Clause of the Fourteenth Amendment". *Vlandis v. Kline,* 412 U.S. 441, 450 n.6 (1973). While *Vlandis* dealt with the imposition of tuition by state universities, the force of this Court's reasoning obviously has equal application to the imposition of exactions to finance a state's elementary and secondary schools. Measure B in effect imposes a tuition for San Jose's schools on those purchasing or renting housing built on property newly zoned or rezoned for residential use, while a similar tuition is not imposed on those purchasing or renting housing on property already zoned for residential use.

Courts of a number of other states have considered the validity of entrance fee type exactions such as those imposed by Measure B. These courts have, contrary to the Supreme Court of California, held that such exactions are not reasonable regulations under the police power and violate the Equal Protection Clause of the Fourteenth Amendment.

In *Midtown Properties, Inc. v. Township of Madison,* 68 N.J.Super. 197, 172 A.2d 40 (1961), *affirmed,* 78 N.J.Super. 471, 189 A.2d 226 (1963), the court invalidated a contract between a housing developer and a city council which, as a condition of obtaining approval of a proposed subdivision, required the developer to pay to the township or its board of education an amount based upon the number of houses built. The court stated:

> ". . . any attempt to compel a developer to pay for building a school, or to donate land for a school, as a condition precedent to giving temporary or final approval to a subdivision is violative of his constitutional rights in that it is a taking of his property without due process of law and deprives him of equal protection of the law, and therefore is illegal and void." 172 A.2d at 47.

In *Weber Basin Home Builders Association v. Roy City,* 26 Utah 2d 215, 487 P.2d 866 (1971), the court invalidated an ordinance increasing the municipal building permit fee from $12 to $112 for the purpose of raising additional revenue to be used partially for handling the water and sewerage needs likely to be created by the new homes to be built. The court held that the statute worked a discrimination between old and new residents and was a denial of the equal protection of the law.

In *Green v. Township of Lima,* 40 Mich.App. 655, 199 N.W.2d 243 (1972), a zoning ordinance prohibiting the construction of a mobile home park because of the burdens it would place on the township for future services was invalidated where the municipality failed to consider the needs of neighboring communities and the region as a whole.

> "To allow the first 600 people in an area to use these artificial boundaries to exclude all but certain kinds of people, or those who can afford to live in favored kinds of housing, or to keep down tax bills of present property owners, subverts the idea of zoning promoting the general welfare." 199 N.W.2d at 248.

In *Molino v. Mayor and Council of the Borough of Glassboro,* 116 N.J. Super. 195, 281 A.2d 401 (1971), the court invalidated an ordinance which effectively restricted apartments to adults and excluded children. The San Jose ordinance encourages the same thing since a developer who builds housing for adults only would not generate any need for additional educational facilities and would not have to pay anything to the school district. *Molino* held that an attempt to limit the number of members of a family able to reside within a city offended the equal protection clause and that the exclusion of residential uses consistent with the needs of the region as a whole was inconsistent with the health, safety and welfare of the people.

Courts of several states have invalidated zoning ordinances which failed to take regional needs into consideration and which attempted, as does Measure B, to protect parochial municipal interests. See *Oakwood at Madison, Inc. v. Township of Madison,* 117 N.J.

Super. 11, 283 A.2d 353, 358 (1971), *cert. granted,* 62 N.J. 185, 299 A.2d 720 (1972), *remanded and affirmed,* 128 N.J.Super. 438, 320 A.2d 223 (1974); *Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel,* 67 N.J. 151, 336 A.2d 713, 726 (1975) (invalidating a zoning ordinance which excluded moderate and low income persons and emphasizing the regional perspective necessarily implicit in the concept of the "general welfare" underlying the police power); *National Land and Investment Co. v. Kohn,* 419 Pa. 504, 215 A.2d 597 (1966); *Appeal of Girsh,* 437 Pa. 237, 263 A.2d 398 (1970); *Appeal of Kit-Mar Builders,* 439 Pa. 466, 268 A.2d 765, 768-69 (1970); *Bristow v. City of Woodhaven,* 35 Mich. App. 205, 192 N.W.2d 322 (1971); *Green v. Township of Lima, supra,* 40 Mich. App. 655, 199 N.W.2d at 247 ("The interest of the potential entrants into the area and their unfettered right to suitable housing within their means in esthetically desirable areas where there is a willing seller is so basic to a free people as to be encompassed in the phrase 'general welfare' "); *Huttig v. City of Richmond Heights,* 372 S.W.2d 833, 842 (Mo.Sup.Ct. 1963); *Board of County Supervisors v. Carper,* 200 Va. 653, 107 S.E.2d 390 (1959); see Case Comment, "The Limits of Permissible Exclusion in Fiscal Zoning", 53 Bost. U.L.Rev. 453, 473 n.92 (1973); Walsh, "Are Local Zoning Bodies Required by the Constitution to Consider Regional Needs?", 3 Conn.L.R. 244, 253-54 (1971); Note, "Regional Impact of Zoning; A Suggested Approach", *supra,* 114 U. Pa. L.Rev. at 1254.

IV.

Zoning by Initiative Is a Violation of the Due Process and Equal Protection Clauses.

Appellant incorporates by reference all of the arguments made by appellant in the companion case, *San Diego Building Contractors Association v. City Council of the City of San Diego,* Docket No. 74-1459, Jurisdictional Statement filed on May 21, 1975.

Conclusion.

This case raises fundamental and substantial issues of federalism, equal protection and due process. As the court below recognized, these are issues of significant public importance which affect large numbers of persons and require prompt resolution.

The decision below permits municipalities to erect substantial barriers to the free movement of persons among and within the states. That decision is contrary to a prior decision of this Court and to the decisions of the highest courts of numerous other states.

For all these reasons, this Court should note probable jurisdiction.

Respectfully submitted,

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APPENDIX

APPENDIX A.

Memorandum of Decision.

In the Superior Court of the State of California, in and for the County of Santa Clara.

Builders Association of Santa Clara-Santa Cruz Counties, a California corporation, individually and for the benefit of its members, Plaintiff, v. City of San Jose, a charter City, et al., Defendants. No. 293759.

The sole issue before the court at this time is whether or not the initiative action was violative of due process because of denial of notice and hearing rights.

San Jose is a chartered city and the initiative ordinance passed is an interim freeze ordinace. The cases of *Bayless v. Limber,* 26 CA3d 463 and *Fletcher v. Porter,* 203 CA2d 313 control in this case and are not affected by Government Code Section 65804.

It would be suggested that further hearings be scheduled for October 17, 18 and 19, 1973.

Dated: October 11, 1973.

/s/ EDWARD L. BRADY
Judge of the Superior Court

APPENDIX B.

Memorandum of Decision.

Superior Court of the State of California, for the County of San Benito (*sic*).

Builders Association of Santa Clara-Santa Cruz Counties, a California corporation, individually and for the benefit of its members, Plaintiff, vs. City of San Jose, a charter City, et al., Defendants. No. 293759.

Before the Court is the question of the validity of San Jose Initiative Ordinance #16764.

The Court, in an earlier determination, ruled on a single issue and in this opinion will rule on remaining issues which have been briefed and argued by the parties.

The urbanization of San Jose is known to all. One of the briefs points out that population increases at the rate of two thousand persons per month and that one thousand five hundred acres of land are added to the City of San Jose each year.

The initiative ordinance restricts certain residential zoning for a two year period unless school district approval is obtained and further requires (not limited to the two year period) an additional affirmative vote to approve zoning and rezoning ordinances for residential uses when a written protest by a school district is filed that finds the zoning "would tend to cause impaction". The above may well be an over simplification of the ordinance, but is sufficient for introductory purposes.

The argument that Section 3 of the ordinance is invalid as there is delegated to the school districts power to zone properties fails. This ordinance does not unlawfully delegate City Council powers. The basis for this determination is *City of Stockton v. Frisbie & Latta,* 93 CA 277, for there, as here, the ordinance also provides that the ultimate decision of the question whether such an exception to the operation of the ordinance shall be allowed rests in the final determination of the City Council.

Contention is also made that the ordinance gives the City Council authority over school construction and that it unlawfully legislates with regard to matters preempted by state statute. A fair reading of the ordinance shows this is not the case.

Section 4 of the ordinance is valid. *Stockton v. Frisbie & Latta,* supra, requiring consent of neighboring property owners as a precondition of a permit by the council and see 21 ALR 2d 551, 556, as well as *Dwyer v. City Council of Berkeley,* 200 C 505. The word "impaction" is a sufficient standard when read with the remainder of the ordinance to avoid vagueness.

The proposition that the ordinance as a whole is void as a violation of constitutionally protected rights in that it creates unreasonable classifications having no rational basis cannot stand in the light of *Associated Home Builders v. City of Walnut Creek,* 4 C3d 633. See also *Town of Los Altos Hills v. Adobe Creek Properties, Inc.,* 32 CA3d 488 with its requirement that distinctions bear some rational relationship to a conceivable legitimate purpose and this Ordinance #16764 does.

In discussing substantive due process as it relates to the ordinance, issues of imposition of an arbitrary and unreasonable condition and again unlawful delegation of legislative power are raised. The previous discussion

of *City of Stockton v. Frisbie & Latta,* supra, would apply for the delegation issue. As to the other due process issue, arbitrary and unreasonable classification, the Court would again refer to *Associated Home Builders v. City of Walnut Creek,* supra.

The contention that the ordinance is an "anti growth" measure fails. With the exception of Section 4 of the ordinance we are dealing with a "freeze" and it is reasonable as to time and purpose and has sufficient specificity, *Fletcher v. Porter,* 203 CA2d 313.

The final issue is as to this being a proper ordinance for initiative action for San Jose, a charter city. Again, *Fletcher v. Porter,* supra, is the answer.

From the above, the request for injunction will be denied. Defendant will prepare judgment and findings of fact and conclusions of law if requested.

Dated: November 20, 1973.

/s/ Edward L. Brady,
Judge of the Superior Court

APPENDIX C.

Opinion of the Supreme Court of the State of California. Tobriner, J.

In the Supreme Court of the State of California, in Bank.

Builders Association of Santa Clara-Santa Cruz Counties, Petitioner, v. The Superior Court of Santa Clara County, Respondent; City of San Jose et al., Real Parties in Interest. S.F. 23085.

Filed: Dec. 26, 1974.

Suffering from serious overcrowding in local schools, the result of explosive residential development during the past decade, and concerned with the inability of the school district to keep pace with the anticipated influx of new residents, the voters of the charter city of San Jose enacted an initiative ordinance to restrict the zoning of land for residential use for a two-year period pending further study of the impact of residential development. The ordinance prohibits the rezoning of land for residential development within impacted areas of the city unless the school districts "in which the subject land is situated" certify that the party seeking rezoning has agreed to provide a satisfactory alternative to permanent school construction. Representing developers, lenders, architects, and other persons interested in residential construction in Santa Clara and Santa Cruz Counties, plaintiff association brought an action in the superior court to enjoin enforcement of the ordinance. The superior court entered judgment for defendants, and plaintiff sought mandate directly from this court.

We issued an alternative writ to consider plaintiff's contention that the residents of a charter city could not

constitutionally enact a zoning ordinance by initiative, an issue of statewide importance then pending before this court in *San Diego Building Contractors Assn. v. City Council,* ante, p. 205. For the reasons set out in our opinion in the *San Diego* case, we find no constitutional impediment to the enactment of zoning measures by initiative. We therefore now turn to the other contentions presented by plaintiff.

Plaintiff association asserts that the ordinance (1) unconstitutionally limits the power of the city council to rezone property; (2) unlawfully delegates zoning authority to the school district; (3) establishes unreasonable classifications in violation of the equal protection clause; and (4) interferes with the constitutional right to travel. An examination of the specific provisions of the ordinance, however, will demonstrate the lack of merit in these contentions.

We begin by summarizing the substantive provisions of the ordinance.[1] Section 1 provides that for two years

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[1]Omitting the preamble, the ordinance reads as follows:

"1. For a period of two years from the date this ordinance becomes effective, the City Council of San Jose shall not zone, pre-zone, or re-zone any land for residential use, if such land is located in a school district where the total area of school building construction per pupil of estimated enrollment, counting the estimated enrollment of the proposed development itself, will be less than that computed under the following schedule:

Type of School	Enrollment	Sq. Ft. Per Pupil
Elementary school comprising kindergarten and grades 1 to 6 inclusive	300 or more	55
Elementary school comprising grades 7 and 8	750 or more	75
Junior high school comprising grades 7 to 9 inclusive	750 or more	75
Junior high school comprising grades 7 to 10 inclusive	750 or more	75
High school comprising grades 7 to 12 inclusive	750 or more	80

from its effective date "the City Council of San Jose shall not zone, pre-zone, or re-zone any land for residential use" if such land is located in an overcrowded

Type of School	Enrollment	Sq. Ft. Per Pupil
High school comprising grades 9 to 12 inclusive	750 or more	85
High school comprising grades 10 to 12 inclusive	750 or more	85

"For purposes of this ordinance, the estimate of enrollment must be one which is valid for use under Section 19420 of the California Education Code, as amended.

"This section shall apply to ordinances which are adopted as urgency or emergency ordinances.

"2. During the aforesaid two-year period, the City of San Jose, in cooperation with all entities in any way responsible for community services within the City, and with maximum citizen participation, shall undertake a thorough study of all problems connected with further residential development in the City, including, but not limited to, the following:

"a) How all further residential developments can be allowed to take place only with insurance that all necessary community facilities will be provided concurrently with such development.

"b) Whether further residential development should be allowed if it violates any environmental standards, particularly those pertaining to water and air pollution, or overtaxes the ground water supply.

"c) What are the costs and benefits of further residential development, and how can the City ensure that any development that does take place shall constitute a net benefit to the City.

"d) How further residential development can be required to include an equitable proportion of housing for all income levels.

"e) What the optimum population level is for the City of San Jose, considering all environmental, economic, and other human factors.

"f) What actions can be taken to ease the shift of the San Jose economy to one less dependent on residential growth.

"3. The provisions of Section 1 of this ordinance shall not apply if there is filed with the City Council, by or on behalf of the governing bodies of all school districts in which the subject land is situated, written certification that the party seeking residential use has entered into binding agreements to provide a satisfactory temporary alternative to permanent school construction.

"4. If, prior to the closing of the City Council hearing on a proposed ordinance zoning or rezoning property to a residential

(This footnote is continued on next page)

school district as defined in the ordinance.[2] Section 2 requires the city to utilize the two-year freeze to undertake a thorough study of the problems connected with further residential developments. Section 3 offers an exception to the zoning freeze, permitting residential zoning if the school district certifies "that the party seeking residential use has entered into binding agreements to provide a satisfactory temporary alternative to permanent school construction." Section 4, the only substantive provision of the ordinance not limited to two years duration, states that if the school district files a written protest against adoption of any proposed zoning ordinance on the ground that its adoption would tend to cause impaction in district schools, the council may not adopt the ordinance unless it first rejects the protest by an affirmative vote of five of the seven members of the council.[3] Finally, section 5 prohibits

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use, or granting any permit of any kind for residential use, there is filed with the City Council, by or on behalf of the governing body of any school district in which the subject property is located, a written protest against the adoption of the proposed ordinance or permit, on the ground that said governing body has found that said ordinance or permit would tend to cause impaction in any individual school or schools in said district, then in that event the City Council shall not adopt said ordinance unless said Council first overrules such protest by an affirmative vote of five or more of its voters.

"This section shall apply to ordinances which are adopted as urgency or emergency ordinances.

"5. No part of this ordinance may be amended or repealed except by the voters of the City of San Jose at a regular municipal election.

"6. If any portion of this ordinance is declared invalid, the remaining portions are to be considered severable and valid."

[2]The initiative was enacted April 10, 1973, effective April 27, 1973.

[3]Plaintiff challenged the constitutionality of section 4 of the ordinance before the superior court, but did not raise that issue in its petition for mandamus before this court.

repeal of the ordinance except by vote of the residents, and section 6 is a standard severability clause.

Plaintiff first attacks the constitutionality of the initiative ordinance because it limits the power of the city council to rezone property during the period of the interim freeze. Since no council could, by ordinance, bar a future council from considering zoning applications (cf. *Thompson v. Board of Trustees* (1904) 144 Cal. 281, 283 [77 P. 951]), plaintiffs argue that the people by initiative cannot so limit the council's power.[4] The courts, however, have upheld the right of residents of charter cities, in enacting zoning initiatives, to bar the city council from altering or repealing the zoning established by the initiative. (*Bayless v. Limber* (1972) 26 Cal.App.3d 463 [102 Cal.Rptr. 647]; *Fletcher v. Porter* (1962) 203 Cal.App.2d 313 [21 Cal.Rptr. 452].) We see no difference in principle between an initiative which bars a city council from repealing newly enacted zoning restrictions, and one which freezes

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[4]Plaintiff also argues that the initiative violates the principle, stated in *Simpson v. Hite* (1950) 36 Cal.2d 125, 134 [222 P.2d 225], that "the initiative or referendum is not applicable where 'the inevitable effect would be greatly to impair or wholly destroy the efficacy of some *other* governmental power, the practical application of which is essential.' " (Italics added.) As the italicized word indicates, this principle serves to invalidate an initiative which, in limiting one governmental power, impairs or destroys the ability of government to exercise a different and more essential power. For example, in *Simpson v. Hite* itself, the court struck down an initiative which, by limiting the power of a board of supervisors to select the location of a courthouse, threatened to impair the county's power to maintain its courts; *Campen v. Greiner* (1971) 15 Cal.App.3d 836, 843 [93 Cal.Rptr. 525] held invalid an initiative which, by limiting the power of a city council to levy taxes, threatened the city's ability to meet its financial obligations. Plaintiffs, however, point to no essential governmental power which will inevitably be impaired or destroyed by the enactment of an interim zoning freeze.

existing restrictions; either, to be effective, must limit the power of a hostile city council to evade or repeal the initiative ordinance.

Contrary to plaintiff's contention, the initiative does not create a "power vacuum" under which no body has the authority to consider zoning applications; it represents an exercise by the people of their reserved power to legislate (*Ley v. Dominguez* (1931) 212 Cal. 587, 593 [299 P. 713]; *Gayle v. Hamm* (1972) 25 Cal. App.3d 250, 258 [101 Cal.Rptr. 628]), and the people retain the right to repeal the initiative or to grant exceptions to its reach (see *Blotter v. Farrell* (1954) 42 Cal.2d 804, 811 [270 P.2d 481]; Comment, *The Scope of the Initiative and Referendum in California* (1966) 54 Cal.L.Rev. 1717, 1727).

Plaintiff secondly contends that the ordinance unlawfully delegates authority over zoning to the school district.[5] The ordinance, however, does not confer upon the school district any power to rezone property; it provides that the council—which remains the only body which can grant an application to change zoning —will not approve residential zoning in impacted school districts without the district's certification that the district and developer have arrived at an agreement to provide the needed school facilities.

In *City of Stockton v. Frisbie & Latta* (1928) 93 Cal.App. 277, property owners challenged a city ordinance which permitted nonresidential uses in residential

[5]Plaintiff also contends that the initiative ordinance unlawfully legislates on the subject of school construction, a field which, it alleges, is preempted by the state. (See *Hall v. City of Taft* (1956) 47 Cal.2d 177 [302 P.2d 574].) Plaintiff founds this argument upon the assertion that section 3 of the initiative can be interpreted to *require* school districts to enter into binding agreements to provide temporary alternatives to school construction. Section 3, however, imposes no duty upon school boards to enter into such agreements, and cannot reasonably be interpreted to infer such a duty. Plaintiff's proposed interpretation violates the principle that an initiative should be liberally construed to uphold its validity. (*Ley v. Dominguez, supra,* 212 Cal. 587, 593; *Blotter v. Farrell, supra,* 42 Cal.2d 804, 809; *Mervynne v. Acker* (1961) 189 Cal.App.2d 558, 563-564 [11 Cal.Rptr. 340].)

zones only with the written consent of three-fourths of the neighboring property owners; the court held that since the council retained the ultimate power to grant or deny the use permit, the ordinance did not unlawfully delegate zoning authority to the neighboring property owners (93 Cal.App. 277, at p. 295). Cities commonly require certification that proposed subdivision improvements are adequate as a condition to approving the subdivision; it has never been suggested that such practice constitutes a delegation of the power to approve subdivisions to the certifying agency. If the principal difficulty with a proposed rezoning inheres not in its effect upon neighboring property or the possible inadequacy of its proposed improvements, but in its exacerbation of overcrowding in district schools, we see no reason why the city may not condition approval of the zoning application upon certification by the school district that adequate facilities can be provided.[6]

Plaintiff thirdly contends that the ordinance establishes an unconstitutional classification by discriminating between property lacking residential zoning and similar property which has already secured that zon-

[6]Plaintiffs suggest that the school district might require a property owner to dedicate land, construct improvements, or pay fees as a condition to certification. The imposition of such conditions, however, would not necessarily render the ordinance invalid, particularly if the conditions related to the need for increased facilities created by the zoning change. (See generally Feldman, *Constitutionality of Subdivision Exactions for Educa-*

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ing.[7] Subject to any applicable permit or subdivision requirements, an owner whose property is zoned for residential use may construct a residence in conformity with that zoning; the owner whose property is not residentially zoned can only hope that he can persuade the council to grant him a change in zoning. Certainly there is nothing irrational in the voters' determination to permit residential construction, pending completion of a thorough study of problems of residential development, only by those owners whose property has already been found suitable for such construction.[8]

Plaintiff finally contends that the initiative ordinance interferes with a constitutional right to travel and to live in the community of one's choosing. We need not, however, explore the unsettled boundaries of this constitutional right, nor confront the difficult task of balancing that right against the right of a city to enact zoning restrictions to promote the quality of civic life (see *Village of Belle Terre v. Boraas* (1974) 416 U.S.

tional Purposes (1972) 76 Dick.L.Rev. 651.) In *Jordan v. Village of Menomonee Falls* (1966) 28 Wis.2d 608 [137 N.W.2d 442, 448-450], the Wisconsin Supreme Court upheld an ordinance requiring dedication of land for school purposes, or payment of a fee in lieu of dedication, if the need for increased facilities was attributable to the developer's activities; we in turn relied on *Jordan* in *Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 644 [94 Cal.Rptr. 630, 484 P.2d 606], to uphold a statute requiring dedication of land for parks.

[7]Plaintiff's other equal protection arguments assume that school districts, before entering into and certifying agreements to provide temporary school facilities, will exact from the developer payments disproportionate to the increased need for school facilities created by the development. The record before us contains no facts to support such charges.

[8]The discrimination enacted by the ordinance is economic in character, and hence valid if rationally related to a legitimate legislative purpose (see *Town of Los Altos Hills v. Adobe Creek Properties, Inc.* (1973) 32 Cal.App.3d 488, 508-509 [108 Cal. Rptr. 271] and cases there cited).

1, 7 [39 L.Ed.2d 797, 803, 94 S.Ct. 1536, 1541]). The zoning freeze established by the initiative here at issue is limited to two years duration, and applies only to that portion of the city plagued with the problem of over-crowded schools. Even within that portion of the city, the ordinance permits rezoning if the developer will agree to assist the school district in meeting the need for additional facilities which his development has created. Consequently the initiative need not serve to exclude newcomers from San Jose; it may, instead simply divert some development to districts with adequate school facilities, while providing overcrowded districts with the means to accommodate the needs of new residents. The trial court here found that the initiative has not in fact significantly reduced the supply of new housing in San Jose; plaintiff does not challenge that finding. We conclude that plaintiff has failed to demonstrate that the ordinance imposes any noticeable or significant infringement upon the asserted constitutional right to travel.[9]

We conclude that the initiative zoning ordinance enacted by the voters of the charter city of San Jose violates no provision of the state or federal Constitutions. The alternative writ of mandate heretofore issued is therefore discharged, and the petition for writ of mandate is denied.

We concur:

Wright, *C. J.*

Sullivan, *J.*

Files, *J.**

[9]We see no inconsistency between the San Jose General Plan, which contemplates eventual residential development of land now zoned for agriculture, and the initiative's two-year freeze on new residential zoning.

*Assigned by the Chairman of the Judicial Council.

DISSENTING OPINION BY BURKE, J.*

I dissent, for the reasons stated in my dissenting opinion in *San Diego Building Contractors Association v. City Council of San Diego, ante,* page 205. In the instant case the two-year moratorium upon further residential zoning constitutes a substantial restriction upon land use and could have a drastic effect upon property values in the area. Thus, due process principles would require that affected property owners be given notice and hearing before the moratorium goes into effect.

Real parties in interest urge that ordinance 16764 is a valid "interim zoning" provision which, under the cases, may be enacted on an emergency basis without the necessity of notice or hearing. Yet, assuming that an initiative-created ordinance can ever be characterized as an "emergency" measure, the applicable authorities recognize that if interim zoning (i.e., a zoning "freeze") is accomplished without the benefit of notice and hearing, the freeze period must be of reasonably brief duration. For example, the state zoning law provides for a *four-month* period which may be extended only after public hearings have taken place. (Gov. Code, § 65858.) A provision which requires an unreasonably long prehearing restriction could constitute a denial of due process of law.

The interim zoning cases upon which real parties rely are, in large part, inapposite for they fail to address the question whether notice and hearing must be given in order to validate an interim freeze of substantial duration. It is, of course, the rule in this state that interim zoning in appropriate circumstances is a proper exercise of the police power vested in all municipal bodies. Thus, in *Miller v. Board of Public Works,* 195 Cal. 477 [234 P. 381, 38 A.L.R. 1479], this court upheld an ordinance which temporarily prohibited the construction of multi-family apartments pending completion of a city-wide plan contemplating development of the affected area as residential. Although the ordinance in *Miller* was described as an "emergency" measure, the court did not discuss the question whether notice and hearing was given or, if not, was required. (See also *Lima v. Woodruff,* 107 Cal.App. 285 [290 P. 480]; *Hunter v. Adams,* 180 Cal.App.2d 511 [4 Cal.Rptr. 776].)

The first interim zoning case to approach the issue before us is *Mang v. County of Santa Barbara,* 182 Cal.App.2d 93 [5 Cal.Rptr. 724], involving an ordinance which indefinitely prohibited the granting of certain building permits pending adoption of a permanent ordinance on the subject. A property owner complained that the ordinance was enacted without notice or hearing as required by the state zoning laws. The court, without considering the due process issue, noted that under the then-existing statutory provision (former Gov. Code, § 65806), the governing body was permitted to adopt "as an urgency measure, a temporary interim zoning ordinance" prohibiting uses in conflict with a proposed, but not yet enacted, zoning ordinance. The court explained that, under the record in that case, it was clear that the ordinance "was obviously intended to be limited in duration and to expire upon the adoption of the permanent ordinance as to which studies were in progress. Nothing in [former] section 65806 requires the fixing of a precise time limit. . . ." (P. 99.) The court stated further that ". . . a permanent zoning ordinance was in fact adopted within a reasonable time." (P. 98.)

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

Thereafter, in 1961, the Legislature amended section 65806 (perhaps in response to the 1960 *Mang* decision) to provide that an emergency interim zoning provision could extend no longer than one year, unless notice and hearing were afforded. Subsequently, in *Metro Realty v. County of El Dorado,* 222 Cal.App.2d 508 [35 Cal.Rptr. 480], the court upheld an emergency interim zoning ordinance which temporarily prohibited certain construction pending adoption of a comprehensive plan. The court, noting that the ordinance in fact had a "very brief life" (p. 517), stated that "When the permanent plan and a zoning ordinance thereunder are before the county for adoption, notice and hearing will be required *as an essential part of procedural due process.* [Citation.]" (Italics added; p. 518.) The court concluded that the adoption of the short-lived urgency ordinance was proper despite the lack of notice or hearing.

Following the *Metro* case, and in 1965, the Legislature once again amended the interim ordinance provisions of the state zoning laws. Section 65806 was repealed and section 65858 adopted in its place to provide that an interim ordinance "shall be of no further force and effect 90 days from the date of adoption thereof . . ." unless the legislative body by a four-fifths vote *and after notice and hearing is given* extends the ordinance for one year; not more than two such extensions are permitted. Subsequently, in 1971, the 90-day period was deleted and a four-month's period inserted, and provision was made for two subsequent extensions, *following notice and hearing,* of eight months and one year respectively. Thus, the Legislature presently considers *four months* a reasonable period to permit the operation of an emergency interim zoning ordinance.

Real parties urge that since charter cities are exempt from the provisions of the state zoning law, and particularly the four-month limitation of section 65858 (see Gov. Code, §§ 65803-65804), such cities properly may provide for a longer period of time before requiring notice and hearing to affected property owners. (*Fletcher v. Porter,* 203 Cal.App.2d 313, 325 [21 Cal.Rptr. 452].) Yet, as I have pointed out my dissent in the *San Diego* case, *ante,* page 205, although charter cities and counties are not bound by the specific provisions of the state zoning law, they are required to meet those minimum standards necessary to provide property owners with due process of law. Although it is difficult to specify the precise limitations which constitutional principles impose upon the power of a city to enact "emergency" interim zoning ordinances without notice and hearing, the four-month limitation set forth in section 65858 appears reasonable in light of the apparent ease of holding public hearings to authorize an extended "freeze" period. In any event, the two-year prehearing freeze period authorized by the subject ordinance seems clearly excessive; real parties make no effort to explain why property owners should be required to wait two years before they are afforded an effective opportunity to be heard.[1] As stated by one commentator, "The duration of a charter city interim ordinance is controlled by the individual charter or municipal code. If there is no time limitation, *or the ordinance will not terminate within a reasonable time by its own terms,* an argument could be made that the

[1]I do not mean to suggest that, if the requisite notice and hearing were afforded, a two-year freeze nevertheless would be excessive. In view of the evident difficulties inherent in drafting comprehensive zoning plans, "we may take judicial notice of the

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ordinance is permanent. *Due process would then suggest the need to comply with the more formal requirements necessary to enact permanent ordinances.*" (Italics added; California Zoning Practice [Cont. Ed. Bar p. 122, § 4.30; see also *Metro Realty v. County of El Dorado, supra,* 222 Cal.App.2d 508, 516; Comment, 18 Syracuse L.Rev. 837, 846-847, 850; Annot., 30 A.L.R.3d 1196, 1214-1217, and cases cited.)

I conclude that the ordinance at issue is invalid for lack of provision for notice and hearing. A writ of mandate should issue directing the trial court to order a preliminary injunction as requested by petitioner.

We concur:

McComb, *J.*

Clark, *J.*

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fact that it will take much time to work out the details of such a plan and that obviously it would be destructive of the plan if, during the period of its incubation, parties seeking to evade the operation thereof should be permitted to enter upon a course of construction which might progress so far as to defeat in whole or in part the ultimate execution of the plan." (*Miller v. Board of Public Works, supra,* 195 Cal. 477, 496.) It has been suggested that one to three years may be required in order to complete the requisite studies necessary to draft an acceptable plan. (Anderson, American Law of Zoning, § 5.15, p. 275.)

APPENDIX D.

Opinion of the Supreme Court of the State of California. Tobriner, J.

In the Supreme Court of the State of California, in Bank.

San Diego Building Contractors Association et al., Plaintiffs and Respondents, v. City Council of the City of San Diego, Defendant and Appellant. L.A. 30250, Super. Ct. No. 338110.

In this case we must determine whether the voters of San Diego, and, more generally, the electors of any charter city in California, may validly enact a zoning ordinance through the initiative process. Plaintiffs, building contractor associations, contend that the provisions of both the San Diego City Charter and the "due process" clause of the federal Constitution preclude the city from adopting any zoning ordinance without affording all affected property owners "notice and hearing"; because the city's present initiative procedure contains no provision for such notice and hearing, plaintiffs assert that zoning ordinances cannot be adopted by initiative. Although the trial court agreed with plaintiffs and entered summary judgment in their favor, we have concluded that its decision was in error and, accordingly, we reverse.

As we explain, settled constitutional doctrine establishes that due process requires "notice and hearing" only in quasi-judicial or adjudicatory settings and not in the adoption of general legislation. Inasmuch as the zoning ordinance at issue here, establishing a uniform height limitation for buildings which may be erected along the city's coastline in the future, is unquestionably a general legislative act, the due process requirements

of notice and hearing do not apply. Moreover, as we demonstrate, the provisions of the San Diego City Charter define the citizenry's fundamental right to initiate legislation in broad and generous terms and do not withhold the initiative power from zoning matters. Consequently, we conclude that citizens of San Diego may enact zoning ordinances by initiative and that the ordinance challenged in the instant case is valid.

In November 1972, the voters of the City of San Diego, a charter city, enacted an ordinance establishing a 30-foot height limitation for buildings which may be constructed within a prescribed coastal zone in the city.[1] The ordinance was adopted in accordance with the initiative procedure set forth in the San Diego City Charter and Elections Code, procedures authorized by article XI, section 5, of our state Constitution (*In re Pfahler* (1906) 150 Cal. 71 [88 P. 270]; *Morton v. Broderick* (1897) 118 Cal. 474, 487 [50 P. 644].) All parties agree that the prescribed initiative procedures were complied with in full.

Subsequent to the adoption of the ordinance, plaintiffs instituted the present action challenging on various

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[1]The ordinance (No. 10896, submitted to the voters as Proposition D) provides: "Notwithstanding any section to the contrary, no building or addition to a building shall be constructed with a height in excess of thirty feet within the Coastal Zone of the City of San Diego. The words Coastal Zone, as used within this Ordinance, shall mean that land and water area of the City of San Diego from the northern city limits south to the border of the Republic of Mexico, extending seaward to the outer limit of city jurisdiction and extending inland to the location of Interstate 5 on January 1, 1971. This limitation shall not apply to that land area of the Coastal Zone bounded by National City on the south, San Diego Bay on the west and Laurel Street or the southwesterly projection of Laurel Street on the north.

"The base of measurement of the height shall be in accordance with the Uniform Building Code of 1970.

"Notwithstanding any section to the contrary, there shall be no exception to the provisions of this Ordinance."

grounds the validity of the ordinance. After a hearing, the trial court granted plaintiffs' motion for summary judgment, concluding that both the provisions of the San Diego City Charter and the due process clause of the Fourteenth Amendment to the United States Constitution prohibit the enactment of a zoning ordinance through the initiative process; the court enjoined the city from enforcing the ordinance. The City of San Diego appeals from the decision.

1. *The provisions of the San Diego City Charter authorize the enactment of all ordinances, including zoning ordinances, through the initiative process.*

Plaintiffs initially contend that the San Diego City Charter itself precludes the enactment of a zoning ordinance by the initiative process. As we explain, we find this argument totally untenable.

Article III, section 11 of the San Diego City Charter vests all of the city's legislative powers in the city council "except such legislative powers as are reserved to the people by the Charter and the Constitution of the State. . . ." Article III, section 23 of the charter elaborates the people's reserved legislative powers, providing in broad terms: "The right to recall municipal officers and the powers of the initiative and referendum are hereby reserved to the people of the City. *Ordinances may be initiated*; and referendum may be exercised on any ordinance passed by the Council except an ordinance which by the provisions of this charter takes effect immediately upon its passage; and any elective officer may be recalled from office." (Italics added.)

Through these provisions, the charter establishes the right of the people to initiate ordinances on all legislative matters. The charter makes no exception for

"zoning ordinances," as distinguished from any other exercise of the police power, and past cases establish beyond question that a charter's broad grant of the initiative and referendum powers clearly applies to zoning measures. (See, e.g., *Dwyer v. City Council* (1927) 200 Cal. 505, 511-515 [253 P. 932]; *Bayless v. Limber* (1972) 26 Cal.App.3d 463, 468-469 [102 Cal.Rptr. 647]; *Fletcher v. Porter* (1962) 203 Cal. App.2d 313, 322 [21 Cal.Rptr. 452].)

Although nothing in the charter provisions dealing with the city's legislative powers in general, or with the initiative procedure in particular, provides the slightest indication that zoning measures were intended to be exempted from the initiative process, plaintiffs argue that a remote provision of the charter impliedly precludes the use of the initiative in such matters. Article V of the charter, entitled "Executive and Administrative Services," contains a provision, section 41(c), which provides in relevant part: "The City Planning Commission shall be organized as provided by the laws of the State and have such powers and perform such duties as are prescribed by such laws." State law prescribes certain minimum procedures, including notice and hearing, to be followed by planning commissions generally (see Gov. Code, §§ 65150, 65854), and since San Diego's current initiative process does not encompass such notice and hearing procedures, plaintiffs argue that section 41(c) impliedly precludes the use of the initiative in zoning matters.

This contention, however, completely overstates the reach of section 41(c). The subject of section 41(c) is the city planning commission, not the city council or the people of the city. The section does not purport to limit the power of the people in the exercise of the

initiative power, nor does it prescribe any special legislative procedures to be followed by the city council in the area of zoning.[2] In short, the section simply governs the city planning commission's conduct of its affairs when that commission is authorized to act under the city charter; the section in no manner attempts to impinge on the people's initiative prerogative.[3]

Accordingly, we conclude that the San Diego City Charter authorizes the enactment of the challenged ordinance through the initiative process.

2. *Under the "due process" clause of the United States Constitution, general zoning legislation may be enacted without affording affected landowners "notice and hearing."*

Plaintiffs contend, however, that even if the adoption of zoning measures by initiative is permitted by the

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[2]In this latter regard, section 41(c) pointedly does not refer to specific state zoning law provisions prescribing duties and powers for city councils. (See, e.g., Gov. Code, §§ 65850, 65856.) Government Code section 65803 states: "The provisions of this chapter [chapter 4: Zoning Regulations] shall not apply to a chartered city, except to the extent that the same may be adopted by charter or ordinance of the city" and thus it is clear that the state statutory provisions relating to city councils are not applicable.

In 1971, Government Code section 65804 was amended to prescribe minimal procedural standards for the conduct of zoning hearings by local planning *agencies*. Section 65804 purports to apply to chartered cities as well as general law cities and counties, and one amicus argues that the section requires notice and hearing before any zoning ordinance may be enacted by a charter city. We need not reach the serious state constitutional issue presented by the amicus' interpretation of the section (see *Fletcher v. Porter, supra*, 203 Cal.App.2d 313, 320-321) in this case, however, because the section by its terms only purports to set standards for hearings held by local planning *agencies* (i.e., administrative bodies (see Gov. Code, § 65100)) and does not purport to establish mandatory procedures to be followed before any zoning ordinance may be enacted.

[3]Moreover, even if section 41(c) could conceivably be viewed as creating an "implicit" conflict with the charter provisions re-

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San Diego City Charter, as we have held, such procedure directly conflicts with the due process clause of the United States Constitution. Relying on statements in numerous recent decisions declaring that the "root requirement [of the due process clause is] that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest" (*Boddie v. Connecticut* (1971) 401 U.S. 371, 379 [28 L.Ed. 2d 113, 119, 91 S.Ct. 780] (fn. omitted); see *Goldberg v. Kelly* (1970) 397 U.S. 254 [25 L.Ed.2d 287, 90 S.Ct. 1011]; *Sniadach v. Family Finance Corp.* (1969) 395 U.S. 337 [23 L.Ed.2d 349, 89 S. Ct. 1820]), plaintiffs assert that because the challenged zoning ordinance significantly affects their real property rights, they had a constitutional right to "notice and hearing" before the zoning law was enacted. Since San Diego's initiative procedure does not afford to affected landowners such "notice and hearing," plaintiffs conclude that the enactment of the instant zoning ordinance violated their constitutional rights.

Plaintiffs' entire due process argument, however, is founded on an erroneous premise. From the inception of this nation's legal system, statutes of general application have regularly been enacted without affording each potentially affected individual notice and hearing. As we shall explain, it is black letter constitutional law that due process requires "notice and hearing" only in quasi-judicial or adjudicatory settings and not with respect to the adoption of general legislation. Since the enactment of the instant general zoning ordinance

lating to the initiative power, the authorities clearly indicate that the people's right to initiate legislation would take precedence. "[The] power of initiative must be liberally construed . . . to promote the democratic process." (*Farley v. Healy* (1967) 67 Cal.2d 325, 328 [62 Cal.Rptr. 26, 431 P.2d 650]; *Blotter v. Farrell* (1954) 42 Cal.2d 804, 809 [270 P.2d 481].)

through the initiative process was unquestionably a legislative, as distinguished from adjudicative, act, the constitutional requirements of "notice" and "hearing" do not apply.

Justice Oliver Wendell Holmes, writing for a unanimous United States Supreme Court in *Bi-Metallic Co. v. Colorado* (1915) 239 U.S. 441, 445 [60 L.Ed. 372, 375, 36 S.Ct. 141], clearly articulated the due process principles that govern the instant case. Justice Holmes declared: "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." California courts have uniformly adhered to the constitutional teaching of the *Bi-Metallic* decision, repeatedly reaffirming that "[t]here is no constitutional requirement for any hearing in a quasi-legislative proceeding." (*Franchise Tax Board v. Superior Court* (1950) 36 Cal.2d 538, 549 [225 P.2d 905]; see e.g., *Beck v. City Council of Beverly Hills* (1973) 30 Cal. App.3d 112, 115 [106 Cal.Rptr. 163]; *California Grape etc. League v. Industrial Welfare Com.* (1969) 268 Cal.App.2d 692, 708-709 [74 Cal.Rptr. 313].)

Plaintiffs, in relying upon the recent procedural due process decisions represented by *Boddie v. Connecticut, supra,* 401 U.S. 371 and similar cases, neglect the fundamental difference between such cases and the

present matter; the decisions applying the due process requirements of notice and hearing have all involved governmental decisionmaking in an *adjudicative* setting, in which the government's action affecting an individual was determined by facts peculiar to the individual case;[4] the present matter, by contrast, involves the adoption of a broad, generally applicable, *legislative* rule. The seminal decisions of the United States Supreme Court clearly indicate that the due process requirements of notice and hearing are applicable only to governmental actions of an adjudicatory nature. In *Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 313 [94 L.Ed. 865, 872-873, 70 S.Ct. 652], for example, Justice Jackson declared: "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property *by adjudication* be preceded by notice and opportunity for hearing appropriate to the nature of the case." (Italics added.) (See, e.g., *Boddie v. Connecticut, supra,* 401 U.S. 371, 377-378 [28 L.Ed. 2d 113, 118-119]; *Ownbey v. Morgan* (1921) 256 U.S. 94, 110-111 [65 L.Ed. 837, 845-846, 41 S.Ct. 433].)

The San Diego ordinance challenged in the instant action is unquestionably a general legislative act. We

[4]Thus, for example, *Morrissey v. Brewer* (1972) 408 U.S. 471 [33 L.Ed.2d 484, 92 S.Ct. 2593] involved a governmental determination as to the revocation of an individual's parole status, *Goldberg v. Kelly, supra,* 397 U.S. 254 concerned a decision as to the termination of an individual recipient's welfare grant, *Bell v. Burson* (1971) 402 U.S. 535 addressed a proceeding adjudicating the revocation of an individual's driver's license and *Sniadach v. Family Finance Corp., supra,* 395 U.S. 337 involved the garnishment of an individual debtor's wages. None of the decisions involved governmental enactment of a general legislative rule.

are thus not faced in the instant case with any of the great number of more limited "administrative" zoning decisions, such as the grant of a variance or the award of a conditional use permit, which are adjudicatory in nature[5] and which thus involve entirely different constitutional considerations. Instead we review the enactment of legislation of the classic mold, establishing a broad, generally applicable rule of conduct on the basis of a general public policy. Under the established constitutional principle noted above, notice and hearing have never been constitutional prerequisites for the adoption of such a legislative enactment. (See generally 1 Davis, Administrative Law (1958) §§ 7.04, 7.06, pp. 420-426, 429-432. See also *United States v. Florida East Coast R. Co.* (1973) 410 U.S. 224, 244-245 [35 L.Ed.2d 223, 238-239, 93 S.Ct. 810].)

Plaintiffs contend, however, that there is an exception to this established constitutional principle in the case of "zoning" legislation; they urge that zoning measures, unlike all other legislation, can only be adopted after notice and hearing to all affected landowners. The justification for this asserted exception appears to be that zoning measures frequently have a substantial impact on real property values. This characteristic of zoning measures, however, does not warrant differential treatment for a number of reasons.

[5]"It is long settled law that the enactment of a zoning ordinance is purely a legislative act. . . . It is to be distinguished from the granting or denial of a variance a conditional use permit or an exception to use, all of which call for administrative action. . . ." (*Tandy v. City of Oakland* (1962) 208 Cal.App. 2d 609, 611 [25 Cal.Rptr. 429]; see e.g., *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 517 [113 Cal.Rptr. 836, 522 P.2d 12] (grant of variance a quasi-judicial, administrative act); *Johnston v. City of Claremont* (1958) 49 Cal.2d 826, 834 [323 P.2d 71] (grant of use permit an administrative act); *Johnston v. Board of Supervisors* (1947) 31 Cal.2d 66, 74 [187 P.2d 686] (same).)

In the first place, although zoning measures frequently do significantly affect real property values, this attribute does not distinguish such measures from a host of other legislative enactments which may have an equally important impact on those values. For example, legislative decisions as to the location of public improvements, the standards of building and health and safety codes, or the level of property tax rates all have considerable direct effect on land values; moreover, even such basic legislative policy decisions as the level of educational expenditures may have substantial indirect effect on property values. Plaintiffs suggest no reasons why zoning measures should invoke different constitutional procedures than any of these other legislative matters.

Second, and even more fundamentally, plaintiffs fail to explain why legislation which has a significant impact on real property rights and real property values should be differentiated from legislation which significantly affects other rights or other values. The due process clause of our federal Constitution applies uniformly to deprivations of "*life, liberty or property*," and the time has long past when property rights were exalted over our citizens' rights in life or liberty. Legislative enactments are continually adopted which significantly affect individuals' "life or liberty"; trades and professions are subjected for the public good to complex regulations limiting the liberty to engage in such occupations, and sharp business practices are continually regulated through criminal statutes. If such legislative measures can be enacted without affording affected individuals notice and hearing, as plaintiffs concede, plaintiffs cannot reasonably contend that notice and hearing are constitutional prerequisites for zoning legislation.

Indeed, the authoritative decisions of the United States Supreme Court clearly demonstrate that the constitutional principle permitting the enactment of legislation without notice and hearing is as applicable to legislation affecting the value of real property as to any other legislation. The *Bi-Metallic* decision itself, for example, involved a landowner's challenge to an order of the State Board of Equalization increasing the valuation of all taxable property in the City of Denver by 40 percent. Such an increase, of course, unquestionably significantly affected property values in Denver, and plaintiff postulated the invalidity of the order on the failure to afford him an opportunity to be heard prior to its adoption. Justice Holmes, writing for a unanimous court, rejected the landowner's contention in no uncertain terms: "The question . . . is whether all individuals have a constitutional right to be heard before a matter can be decided in which all are equally concerned—here, for instance, before a superior board decides that the local taxing officers have adopted a system of undervaluation throughout a county. . . . *The answer of this court in the State Railroad Cases* [(1875)] *92 U.S. 575 . . . was that it was hard to believe that the proposition was serious made.*" (Italics added.) (239 U.S. at p. 445 [60 L.Ed. at 375].)

Moreover, in rejecting out-of-hand the plaintiff's contention that a quasi-legislative order of an administrative board was void for lack of notice or hearing, the *Bi-Metallic* court indicated that it was *even clearer* that an actual legislative act could be adopted without such notice or hearing, even if such legislation seriously affected property rights. Justice Holmes wrote: "General statutes within the same power are passed that affect the person *or property* of individuals, *sometimes to the*

point of ruin, without giving them a chance to be heard. . . . If the result in this case had been reached as it might have been by the State's doubling the rate of taxation, *no one would suggest that the Fourteenth Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it.* . . ." (Italics added.) (239 U.S. at p. 445 [60 L.Ed. at p. 375].)

The teaching of *Bi-Metallic* was reaffirmed in *Bowles v. Willingham* (1944) 321 U.S. 503 [88 L.Ed. 892, 64 S.Ct. 641], a case involving the validity of a rent control statute. In *Bowles* a federal law authorizing the Director of the Office of Price Administration to establish maximum permissible rents was challenged, inter alia, on procedural due process grounds. Plaintiff landlords claimed that the act was unconstitutional because it permitted the adoption of a maximum rent schedule, inevitably affecting the value of their property, without affording them notice and hearing. The *Bowles* court, noting the quasi-legislative nature of the administrative rent schedule, rejected the plaintiffs' due process contention and, as in *Bi-Metallic,* cited the enactment of legislation as an a fortiori illustration of a situation in which there is no constitutional requirement of notice or hearing. The *Bowles* court stated in this regard: "Obviously, Congress would have been under no necessity to give notice and provide a hearing before it acted, had it decided to fix rents [itself] on a national basis the same as it did for the District of Columbia. See 55 Stat. 788." (321 U.S. at p. 519 [88 L.Ed. at p. 906].)

Ignoring these governing constitutional decisions, plaintiffs cite a string of California cases which they contend establish the constitutional principle that notice and hearing are required before zoning legislation may

be enacted. Upon analysis, however, it is clear that the cited cases are not authoritative precedent for plaintiffs' contention.

Hurst v. City of Burlingame (1929) 207 Cal. 134 [277 p. 308] is the seminal decision in the line of case relied upon by plaintiffs. In *Hurst,* the electors of the City of Burlingame, a general law city, enacted a comprehensive zoning ordinance pursuant to the initiative procedure established by state statute. (See Cal. Const., art. IV, § 25.) Plaintiff in *Hurst* contended that the measure was invalid because it had been adopted without compliance with the procedural requirements of notice and hearing contained in the state Zoning Act; plaintiff argued that since the city's entire power to enact a zoning ordinance stemmed from the grant of authority contained in the Zoning Act, any zoning ordinance which the city adopted had to be enacted pursuant to the mandatory procedures established by the act.

The *Hurst* court, applying the general rule that the initiative power is coextensive with the general legislative authority of a governmental entity, agreed with plaintiff and held that since the city's legislators could not enact a zoning ordinance without complying with the Zoning Act's procedural requirements, the voters had no power to circumvent the statutory procedures through the initiative process. The court concluded that the state Zoning Act, constituting a specific statute directed to the procedure for enacting zoning measures, took precedence over the more general initiative statute.

Thus, the *Hurst* decision rests exclusively on a matter of statutory interpretation; its holding does not rely on constitutional principles at all. One possibly

ambiguous passage of the *Hurst* decision, however, sowed the seeds of plaintiffs' present confusion. That passage of *Hurst,* located in the middle of the opinion's statutory analysis, reads as follows: "When the statute requires notice and hearing as to the possible effect of a zoning law upon property rights the action of the legislative body becomes *quasi* judicial in character and the statutory notice and hearing then becomes necessary in order to satisfy the requirements of due process and may not be dispensed with." (207 Cal. at p. 141.) This passage, however, states only that notice and a hearing are necessary *when required by statute* and implicitly supports the constitutional principle reviewed above by suggesting rather clearly that when there is no such statutory requirement the adoption of a general zoning law remains a legislative act, as to which due process does not require notice and hearing. Because the instant case involves the adoption of a zoning ordinance by a charter city, to which the state Zoning Act does not apply (see Gov. Code, § 65803), the *Hurst* decision lends no support to plaintiffs' position.

Although, when closely analyzed, it is clear that *Hurst* neither held nor implied that in the absence of an applicable statute due process requires notice and hearing before zoning legislation may be enacted, a few subsequent cases have misconstrued the carefully limited language of *Hurst* as articulating the board, constitutional rule advocated by plaintiffs. The one distinctive feature of these few decisions, however is that in every case the erroneously broad rendition of *Hurst's* holding

has been pure dictum.[6] To the extent that such statements are inconsistent with our present opinion they are disapproved.

Plaintiffs also rely heavily on this court's recent decision in *Scott v. City of Indian Wells* (1972) 6 Cal. 3d 541 [99 Cal.Rptr. 745, 492 P.2d 1137], but that decision is entirely inapposite to the instant matter. In *Scott,* the zoning matter at issue did not involve the enactment of a general legislative zoning ordinance, as here, but instead an administrative determination by a local planning commission on an application for a conditional use permit for a particular parcel of land. Be-

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[6]In *City of Escondido v. Desert Outdoor Advertising, Inc.* (1973) 8 Cal.3d 785, 790 [106 Cal.Rptr. 172, 505 P.2d 1012], for example, we held that the plaintiff general law city's anti-billboard ordinance was a valid enactment which did not fall within the aegis of the state Zoning Act, and then gratuitously suggested in dictum, citing *Hurst,* that in zoning matters the statutory procedures were constitutionally required. And in *Gilgert v. Stockton Port District* (1936) 7 Cal.2d 384, 391 [60 P.2d 847], our court held that because the Legislature had not authorized the district to enact zoning laws, the district possessed no such authority; the *Gilgert* court buttressed this holding by suggesting in dictum that the lack of a notice or hearing mechanism also precluded the district from creating such zones.

The *Gilgert* dictum was based in large measure upon similar dictum in the earlier Court of Appeal decision of *Berrata v. Sales* (1927) 82 Cal.App. 324, 327 [255 P. 538], which suggested that due process requires "notice" in these circumstances only after first holding that notice was actually required by an applicable statute. Indeed, almost all of the decisions—both in California and from out sister states—relied upon by plaintiffs follow the pattern of the *Berrata* decision; the decision in each of these cases has been based specifically on an applicable statute and discussion of constitutional requirements has been pure dictum. (See *Taschner v. City Council* (1973) 31 Cal.App.3d 48 [107 Cal.Rptr. 214]; *People's Lobby, Inc. v. Board of Supervisors* (1973) 31 Cal.App.3d 869 [106 Cal.Rptr. 666]; cf. *Cugini v. Chiaradio* (1963) 96 R.I. 120 [189 A.2d 798]; *Hart v. Bayless Investment & Trading Co.* (1959) 86 Ariz. 379 [346 P.2d 1101].)

cause of the administrative, adjudicatory nature of the use permit procedure at issue in *Scott* (see fn. 5, *supra*), both statutory and constitutional provisions called for notice and hearing; the only issue in the case turned on whether the city could give such notice and hearing to adjoining landowners who resided within the city, but deny such notice and hearing to similarly affected adjoining landowners who lived outside the city boundaries. We held in *Scott* that "the City of Indian Wells owes adjoining landowners who are not city residents a duty of notice to the extent given similarly situated city residents. . . ." (6 Cal.3d at p. 549.)

The *Scott* decision provides absolutely no authority for plaintiffs' contention that due process requires notice and hearing before a legislative zoning ordinance may be adopted; indeed, *Scott* explicitly recognizes that the due process requirements of notice and hearing adhere only in adjudicative settings, such as the grant of a conditional use permit presented by the facts of that case. In summarizing the applicable constitutional principles, the *Scott* court declared "[T]he due process clause of the Fourteenth Amendment requires 'at a minimum . . . that deprivation of life, liberty or property *by adjudication* be preceded by notice and opportunity for hearing. . . .' [citation]." (Italics added.) (6 Cal.3d at p. 549, quoting *Mullane v. Central Hanover Tr. Co., supra,* 339 U.S. at p. 313 [94 L.Ed. at p. 873].)

Thus, plaintiffs' due process contention is not supported by past California decisions. Indeed, the very contrary obtains. All of the California authorities which have directly faced the constitutional issue posed by the instant case have uniformly concluded that zoning legislation, as all other legislation, may constitutionally be

enacted without affording all affected individuals notice and hearing. (See *Duran v. Cassidy* (1972) 28 Cal. App.3d 574, 583-586 [104 Cal.Rptr. 793]; *Bayless v. Limber, supra,* 26 Cal.App.3d 463, 469-470; cf. *Dwyer v. City Council, supra,* 200 Cal. 505, 516; *Adler v. City Council* (1960) 184 Cal.App.2d 763, 777-778 [7 Cal. Rptr. 805].) For the reasons reviewed above, we reaffirm this established line of authority.

In sum, we conclude that neither the Constitution nor the San Diego City Charter precludes the people of San Diego from enacting a general zoning ordinance through the initiative process.

The judgment is reversed.

We Concur:

Wright, *C. J.*
Sullivan, *J.*
Files, *J.**

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*Assigned by the Chairman of the Judicial Council.

DISSENTING OPINION BY BURKE, J.*

I dissent. This case concerns the important question whether municipal zoning ordinances and other measures substantially affecting or restricting land use properly may be enacted through the initiative process, without providing affected property owners with the traditional due process safeguards of notice and hearing. I would hold that the initiative process as presently designed affords constitutionally inadequate protection to property owners, and that the essential demands of due process of law under the state and federal Constitutions may be satisfied only by a zoning procedure which incorporates some provision for notice and hearing in addition to the minimum opportunities available under the initiative election process itself.

It has long been the rule in this state that, *as to general law cities or counties,* the initiative process does not provide an adequate substitute for compliance with the state zoning law (Gov. Code, §65800 et seq.), and particularly those provisions prescribing the requisite notice and hearing to be afforded to affected property owners. (*Hurst v. City of Burlingame,* 207 Cal. 134 [277 P. 308]; *Johnston v. City of Claremont,* 49 Cal. 2d 826, 837 [323 P.2d 71]; *Laguna Beach Taxpayers' Assn. v. City Council,* 187 Cal.App.2d 412, 415 [9 Cal.Rptr. 775]; *People's Lobby, Inc. v. Board of Supervisors,* 30 Cal.App.3d 869, 872-873 [106 Cal. Rptr. 666]; *Taschner v. City Council,* 31 Cal.App.3d 48, 61-64 [107 Cal.Rptr. 214].)

The preceding cases are based in part on the premise that general law cities and counties are governed by the

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

provisions of the state zoning laws, which laws take precedence over the more general scope of initiative legislation. As stated in *Hurst v. City of Burlingame, supra,* 207 Cal. 134, 141, "The initiative law and the zoning law are hopelessly inconsistent and in conflict as to the manner of the preparation and adoption of a zoning ordinance. The Zoning Act is a special statute dealing with a particular subject and must be deemed to be controlling over the initiative, which is general in its scope."

The majority herein take the position that the rule of the foregoing cases does not apply to *charter* cities or counties which are not bound by the provisions of the state zoning laws.[1] Indeed, this position finds some support in the cases. (See *Fletcher v. Porter,* 203 Cal. App.2d 313, 320-323 [21 Cal.Rptr. 452]; *Bayless v. Limber,* 26 Cal.App.3d 463, 469 [102 Cal.Rptr. 647]; *Duran v. Cassidy,* 28 Cal.App.3d 574, 583-585 [102 Cal.Rptr. 647].) As stated in *Bayless* (p. 469), distinguishing *Hurst v. City of Burlingame, supra,* 207 Cal. 134, and *Laguna Beach Taxpayers' Assn v. City Council, supra,* 187 Cal.App.2d 412, ". . . respondents overlook the decisive fact that these cases involved general law cities while this case is concerned with a chartered city. In those cases it was held that zoning may not be done by intiatitive because the procedure leading to the

[1]Government Code section 65803 provides that the provisions of the zoning laws shall not apply to a charter city except to the extent those laws may be adopted by charter or ordinance. Note, however, section 65804 (as amended in 1971), which specifies that even as to *charter* cities zoning agencies must develop rules of procedure for conducting public hearings "so that all interested parties shall have advance knowledge of procedures to be followed." The section also provides that a record of the hearing must be made, if requested. The section thus assumes, but does not expressly require, that charter cities will hold hearings on zoning measures.

enactment of an initiative ordinance is incompatible with that prescribed by statute for the enactment of zoning ordinances by a city council. . . . But the manner of enacting municipal ordinances is a municpal affair and, as previously indicated, the charter of a chartered city, rather than state statutes, govern municipal affairs within such a city. [Citation.] Moreover, ordinarily, there can be no implied limitations upon chartered powers concerning municipal affairs. [Citation.]"

In my view, the *Bayless* decision, *supra*, was premised upon the incorrect assumption that statutory provision for notice and hearing in zoning matters is a matter of legislative policy, rather than constitutional mandate. The majority seem to concede that if notice and hearing are essential elements of due process of law, even charter cities are powerless to ignore them. I turn then to an analysis of the question whether constitutional principles require some provision for notice and hearing before zoning measures may be adopted. Subsequently, I discuss whether the initiative process itself furnishes sufficient protection to affected property owners so that applicable constitutional principles are satisfied.

1. *Due Process and the Zoning Laws*

This court has frequently recognized that "the most fundamental ingredient of the 'due process' guaranteed by our state Constitution is 'a meaningful opportunity to be heard.'" (*Randone v. Appellate Department*, 5 Cal.3d 536, 550 [96 Cal.Rptr. 709, 488 P.2d 13], and cases cited.) On the other hand, we have acknowledged that "'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Whether the

Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors, the nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account." (*In re Tucker*, 5 Cal.3d 171, 179 [95 Cal.Rptr. 761, 486 P.2d 657], quoting from *Hannah v. Larche*, 363 U.S. 420, 442 [4 L.Ed.2d 1307, 1321, 80 S.Ct. 1502]; see *Sokol v. Public Utilities Commission*, 65 Cal.2d 247, 254 [53 Cal.Rptr. 673, 418 P.2d 265].)

Ordinarily, as the majority explain, if a proceeding is "legislative" rather than "adjudicative" in character, a hearing of a judicial type is not required by the Constitution. (*Franchise Tax Board v. Superior Court*, 36 Cal.2d 538, 549 [225 P.2d 905]; see *United States v. Florida East Coast R. Co.*, 410 U.S. 224, 244-246 [35 L.Ed.2d 223, 238-240, 93 S.Ct. 810]; *Bi-Metallic Co. v. Colorado*, 239 U.S. 441, 445 [60 L.Ed. 372, 375, 36 S.Ct. 141].) Although enactment of a zoning ordinance, contrasted with a grant of an easement or variance, may be characterized as a "legislative" act, nevertheless "A zoning ordinance can and does have a more direct and lasting effect upon property values and property owners within a city than almost any other type of ordinance. What is done with respect to one piece of property of necessity has an effect, good or bad, upon adjacent or nearby property." (*Johnston v. City of Claremont, supra*, 49 Cal.2d 826, 837.)

Accordingly, our cases have long recognized the constitutional right of affected property owners to notice and hearing before a municipality may enact zoning ordinances which substantially restrict the use or otherwise substantially impair the value, of their property.

(*City of Escondido v. Desert Outdoor Advertising, Inc.*, 8 Cal.3d 785, 790 [106 Cal.Rptr. 172, 505 P.2d 1012]; *Scott v. City of Indian Wells*, 6 Cal.3d 541, 549 [99 Cal.Rptr. 745, 492 P.2d 1137]; *Gilgert v. Stockton Port District*, 7 Cal.2d 384, 391 [60 P.2d 847]; *Berrata v. Sales*, 82 Cal.App. 324, 327 [255 P. 538]; see Anderson, American Law of Zoning, § 4.03, p. 159, § 4.11, pp. 168-169; McQuillan, Municipal Corporations, § 25.261, pp. 212-213; Annot., 96 A.L.R. 2d 449, 453, fn. 5.)[2]

For example, we have recently stated that "Zoning does not deprive an adjacent landowner of his property, but it is clear that the individual's interest in his property is often affected by local land use controls, and the 'root requirement' of the due process clause is 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid government interest . . . justifies postponing the hearing until after the event. . . .' [Citations.]" (*Scott v. City of Indian Wells, supra,* 6 Cal.3d 541, 549.) We held in *Scott* that principles of due process of law required a city to provide notice and a hearing to nonresident adjacent landowners whose property would be affected by municipal zoning measures.[3] Thus, it would

[2]For cases from other states setting forth this principle, see *Bell v. Studdard*, 220 Ga. 756 [141 S.E.2d 536, 539]; *Cugini v. Chiaradio*, 96 R.I. 120 [189 A.2d 798]; *Hart v. Bayless Investment & Trading Company*, 86 Ariz. 379 [346 P.2d 1101]; *Vandervort v. Sisters of Mercy of Cincinnati*, 197 Ohio App. 153 [117 N.E.2d 51].

[3]To the same effect is *Gilgert v. Stockton Port District, supra,* 7 Cal.2d 384, 391, wherein we stated that "Zoning is the deprivation, for the public good, of certain uses by owners of property to which their property might otherwise be put, but before the owner may then be deprived of his property and the enjoyment thereof he is entitled to adequate notice and a hearing thereon."

appear firmly established in our jurisprudence that the adoption of zoning measures which involve substantial deprivations of property may not take place in the absence of constitutionally adequate provision for prior notice and hearing. I consider, then, the question whether the initiative process affords adequate due process safeguards.

2. *Due Process and Zoning by Initiative*

Contrary to the majority's position herein, a number of cases have suggested that since the initiative process fails to afford adequate notice and hearing for affected property owners, it may not be constitutionally employed to adopt zoning measures which substantially affect the use of their land. (*People's Lobby, Inc. v. Board of Supervisors, supra,* 30 Cal.App.3d 869, 873-874; *Taschner v. City Council, supra,* 31 Cal.App.3d 48, 65-69; see *Hurst v. City of Burlingame, supra,* 207 Cal. 134, 141; *Johnston v. City of Claremont, supra,* 49 Cal.2d 826, 836-837; *Chase v. Kalber,* 28 Cal.App. 561, 573-574 [153 P. 397]; McQuillin, *supra,* § 25.246, p. 168; *City of Scottsdale v. Superior Court,* 103 Ariz. 204 [439 P.2d 290, 293-294]; *Elliott v. City of Clawson,* 21 Mich.App. 363 [175 N.W. 2d 821, 828]; *Smith v. Township of Livingston,* 106 N.J. Super. 444 [256 A.2d 85], affd. 54 N.J. 525 [257 A.2d 698]; but see *Bayless v. Limber, supra,* 26 Cal.App. 3d 463, 469-470; *Duran v. Cassidy, supra,* 28 Cal. App.3d 574, 585-586.)

As indicated above, the Court of Appeal in *Bayless v. Limber, supra,* 26 Cal.App.3d 463, 469-470, concluded that no denial of constitutional due process occurs when a charter city enacts a zoning ordinance by the initiative process. The court reasoned that "Due

process in law-making is not the same as due process in the adjudication of controversies. [Citations.] Generally speaking, a hearing on a legislative matter is held for the purpose of informing the law makers regarding relevant facts and policy considerations; it is not held for the protection of individual rights, property or otherwise. [Citation.] . . . The electoral process itself normally provides both notice and an opportunityto be heard to all electors, by written arguments (see Elec. Code, § 4017) and otherwise. In our view neither the United States Constitution nor the California Constitution requires more. [Citations.]" The *Duran* case adopted *Bayless'* reasoning in this regard.

Yet as we have seen, prior cases of this court and the Courts of Appeal have established beyond reasonable dispute that the area of zoning is in a class by itself and presents real and tangible risks of deprivation of private property far beyond those involved in ordinary "legislative" measures. To protect the constitutional rights of the property owner the courts heretofore have insisted upon traditional due process safeguards of notice and hearing, safeguards which perform a function far beyond the simple one of "informing the lawmakers regarding relevant facts."[4] Thus, we necessarily must reach the ultimate question whether in fact the initiative process does provide constitutionally adequate notice and hearing, as was assumed in *Bayless* and *Duran*.

In my view the Court of Appeal in *Taschner v. City Council, supra,* 31 Cal.App.3d 48, correctly set

[4]Contrary to *Bayless'* assumption that zoning hearings are held to inform the lawmakers, it is widely acknowledged that such hearings serve the independent purpose of affording property owners an opportunity to be heard. (Anderson, *supra,* § 4.11, p. 168.)

forth the flaws in the *Bayless/Duran* analysis. In *Taschner,* the court explained at length the deficiencies of the initiative process when compared with the procedural safeguards specified in the state zoning laws (Gov. Code, § 65800 et seq.). As stated in *Taschner* (p. 64), "It is urged that interested persons can suffer no substantial injury because the election process itself provides the equivalent safeguards afforded by state zoning law procedures. We are unpersuaded. The kind of public debate on the merits of a proposed zoning measure afforded by the election process, including the limited opportunity for the submission of written arguments to the voters, cannot be equated with a dispassionate study, evaluation and report upon the proposal by a staff of planning experts (§ 65804), notice and hearing before the planning commission (§ 65854), written recommendation by the planning commission with reasons for its recommendation (§ 65855), and notice and hearing before the legislative body (§ 65856). Furthermore, it is common knowledge that election campaigns cost money and that the extent to which one may be heard in an election too often depends on the size of one's pocketbook whereas planning commissions and legislative bodies are required by law to afford all interested persons a full and fair hearing on the merits of their respective claims. Moreover, the election offers the voters but a single choice, to accept or reject the proposal in its entirety. The legislative body, however, is empowered to modify (as well as approve or reject) a recommendation of the planning commission thereby enabling it to consider and take into account in its actions the legitimate claims and suggestions of those who would be affected by the proposal even though they may represent but a small segment of the electorate."

The court concluded, consistent with the views I have expressed above, that some provision for notice and hearing comparable with the provisions of the state zoning laws is required as a matter of constitutional due process, at least whenever the zoning measure substantially affects land use.[5]

Thus, contrary to the statement in *Bayless* that the initiative election process affords adequate opportunity for notice and hearing, it is evident that in its present operation the initiative process fails to afford that degree of protection necessary to satisfy due process requirements under the state and federal Constitutions.[6] I do not, of course, suggest that it would be impossible to modify the initiative process in such a manner as to provide adequate due process safeguards. The Legislature or the governing boards of local public entities might well develop an approach which strikes a proper balance between the rights of the affected property owners and the interests of the public in reversing the power to initiate legislation.[7]

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[5]See also *People's Lobby, Inc. v. Board of Supervisors, supra,* 30 Cal.App.3d 869, 873, pointing out that, as a practical matter, "Zoning proposals should have the benefit of public hearings and professional study by the local government's planning staff so as to integrate the proposal with the other zoning ordinances and particularly the city or county land use master plan. Overall planning would be seriously crippled if the initiative process could be used in this field." See generally, Comment, 10 Cal.West.L.Rev. 105, discussing the legal and practical problems in zoning by initiative.

[6]By comparison, it has been held that the *referendum* process passes constitutional muster in this regard since the referendum election occurs *after* the adoption of the ordinance to be voted upon, and *after* the property owner has had his notice and hearing. (See *Johnston v. City of Claremont, supra,* 49 Cal.2d 826, 836-837; *Hurst v. City of Burlingame, supra,* 207 Cal. 134, 140; *Dwyer v. City Council,* 200 Cal. 505, 516 [253 P. 247]; *Taschner v. City Council, supra,* 31 Cal.App.3d 48, 62, fn. 10.)

[7]See Comment, *supra,* 10 Cal.West.L.Rev. at pages 128-130, setting forth the author's recommended amendment to the state zoning law to permit zoning by initiative with provision for a modification hearing by the governing body after the initiative measure is adopted. See also *Hurst v. City of Burlingame, supra,* 207 Cal. 134, 141.

In the instant case, however, it is apparent that the coastal zone initiative was adopted without providing plaintiffs and others similarly affected an adequate opportunity to be heard. San Diego's new building height restriction is undoubtedly a zoning measure[8] which could substantially affect plaintiffs' use of their land, and substantially decrease its value. (See *Taschner v. City Council, supra,* 31 Cal.App.3d 48, 60, involving a similar building height restriction.)

I would affirm the judgment.

We Concur:
McComb, *J.*
Clark, *J.*

[8]I would leave open for further case development the precise definition of "zoning" under the rule I propose herein. For cases discussing the question whether a particular measure is a zoning measure requiring notice and hearing, see *Taschner v. City Council, supra,* 31 Cal.App.3d 48, 68-69; *Fletcher v. Porter, supra,* 203 Cal.App.2d 313, 324-325; *Laguna Beach Taxpayers' Assn. v. City Council, supra,* 187 Cal.App.2d 412. See also *South Gwinnett Venture v. Pruitt* (5th Cir.) 482 F.2d 389, distinguishing between a general zoning measure affecting the entire community and a more specific measure affecting a particular tract of land or disposing of a single petition for relief.

APPENDIX E.

Order Denying Rehearing.

In the Supreme Court of the State of California, in Bank. S.F. No. 23085.

Builders Association of Santa Clara-Santa Cruz Counties, Petitioner, v. The Superior Court of Santa Clara County, Respondent; City of San Jose et al., Real Parties in Interest.

Files, J., sitting in place of Mosk, J., who deemed himself disqualified.

Filed: Feb. 19, 1975.

Petition for rehearing Denied.

McComb, J., and Clark, J., are of the opinion that the petition should be granted.

/s/ Wright
Chief Justice

APPENDIX F.

Notice of Appeal to the Supreme Court of the United States.

In the Supreme Court of the State of California.

Builders Association of Santa Clara-Santa Cruz Counties, a California corporation, individually and for the benefit of its members, Appellant, vs. Superior Court of the State of California for the County of Santa Clara, Appellee, City of San Jose, a Chartered City, City Council of San Jose, Norman Y. Mineta, Joseph A. Colla, Janet Grey Hayes, Roy B. Naylor, Alfredo Garza, Jr., Susan Wilson and James Self, as members of the City Council of San Jose, Real Parties in Interest. Civil No. S.F. 23085.

Filed: April 9, 1975.

NOTICE IS HEREBY GIVEN:

That Builders Association of Santa Clara-Santa Cruz Counties, now known as Associated Building Industry of Northern California (Southern Division), hereby appeals to the Supreme Court of the United States from the final judgment of this Court, entered December 26, 1974, discharging the alternative Writ of Mandate heretofore issued and denying the Petition for Writ of Mandate. A petition for a rehearing of said matter was denied on February 19, 1975.

This Appeal is taken pursuant to 28 U. S. C. §1257(2).

HOWARD S. SMITH
ROY L. SHULTS
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HERMAN J. MAGER
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By /s/ Howard S. Smith
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